STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL WALKER,

Plaintiff-Appellant,

V

LESLIE H. KUTINSKY and JOHN DAVEY,

Defendants-Appellees.

UNPUBLISHED
October 12, 1999

No. 209554
Oakland Circuit Court
LC No. 97-538231 NO

Before: Hoekstra, P.J., and O'Connell and Danhof*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition in this premises liability action. We affirm.

On November 28, 1995, plaintiff worked as a paralegal for the law firm of Leslie H. Kutinsky, P.C. Defendants are lawyers who, together with their wives, owned the building that housed their offices. While on break, plaintiff sustained injuries when he slipped and fell on ice that had accumulated under the building's downspout. As a result of the injuries, plaintiff received worker's disability compensation benefits.

In redeeming his compensation award, plaintiff released the law firm and defendant Kutinsky, individually and as his employer, from all liability. The release stated, in pertinent part:

> In further consideration of the receipt of this settlement the undersigned employee fully releases and forever discharges the employer, its insurer, its officers, directors and employees from any and all liability, claims, and causes of action whatsoever, including, but not limited to, tort actions, civil rights and handicapped disability claims, claims for wrongful discharge, and any claims for discrimination arising directly or indirectly out of his employment.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

The trial court granted defendant Kutinsky's motion for summary disposition holding that the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131; MSA

17.237(131), and the signed release barred plaintiff's claims. The court also granted defendant Davey's motion for summary disposition, holding that plaintiff presented no evidence that defendant Davey knew or should have known that water from the downspout would accumulate on the pavement.

Initially, we note that plaintiff filed his appeal within the twenty-one day limit prescribed by MCR 7.204(A)(1)(b). Defendants argue that plaintiff's appeal is untimely as to defendant Kutinsky, because plaintiff's motion for reconsideration, filed with the trial court, specifically stated that it only related to defendant Davey. Generally, a party must file an appeal of right within twenty-one days after a final judgment has been entered. MCR 7.204(A)(1)(a). However, if a party files a motion for reconsideration, that party has twenty-one days from the entry of a denial of the motion for reconsideration to bring the appeal. MCR 7.204(1)(A)(b). An order denying a motion for reconsideration is not a final order from which one may appeal as of right, but where the motion has been properly filed, a party may file its appeal as of right within twenty-one days after an order denying the motion for reconsideration. *Nye v Gable, Nelson & Murphy*, 169 Mich App 411, 415; 425 NW2d 797 (1988). Here, defendant simply argues that because the motion for reconsideration only applied to defendant Davey, plaintiff only had an additional twenty-one days with respect to that defendant. We do not read the rule so narrowly. The rule states, in pertinent part:

> An appeal of right in a civil action must be taken within
>
> (a) 21 days after entry of judgment or order appealed from;
>
> (b) 21 days after entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, or a motion for other postjudgment relief, if the motion was filed within the initial 21-day period or within further time the trial court may have allowed during that 21-day period . . .

Nothing in the rule suggests that in a case involving multiple parties the motion for reconsideration only extends the time period for filing an appeal as to those parties mentioned in the motion. Indeed, a motion for reconsideration requires the movant to "demonstrate a palpable error by which the court and the parties have been misled." MCR 2.119(F)(3). It may be that plaintiff felt he could only show palpable error with respect to one of the defendants. This fact should not force him to bring separate appeals for each defendant, one within twenty-one days of the original judgment and another within twenty-one days of the order denying a motion for reconsideration. Where one judgment is at issue, the motion for reconsideration, even if filed with respect to only one of the parties, stays the entire judgment for purposes of calculating the time period for filing an appeal as of right.

Here, plaintiff timely filed his appeal of right. Plaintiff filed a motion for reconsideration shortly after the trial court granted defendants motion for summary disposition. The court denied the motion for reconsideration in an order dated January 21, 1998. On February 9, 1998 plaintiff filed an appeal as of right. This was within the twenty-one day requirement of MCR 7.204(A)(1)(b). Therefore, we have jurisdiction over both defendants.

Having addressed defendant's jurisdictional concerns, we turn our attention to basis for the trial court's order granting summary disposition. This Court reviews a grant of summary disposition de novo. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). Defendants brought their motion pursuant to MCR 2.116(C)(4), (C)(8) and (C)(10). The circuit court did not indicate under which subrule it granted summary disposition. However, because it appears that the court looked beyond the pleadings in making its determination, this Court will consider the motion as having been granted pursuant to MCR 2.116(C)(10). *Swan v Wedgwood Christian Youth and Family Services, Inc*, 230 Mich App 190, 194; 583 NW2d 719 (1998). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Id.* "A court reviewing such a motion should review the record evidence and all reasonable inferences drawn from it and decide whether a genuine issue regarding any material fact exists to warrant a trial." *Id.*

We find that the trial court properly granted summary disposition as to both defendants. Summary disposition as to defendant Kutinsky was appropriate because the release signed by plaintiff barred any further premises liability action. Plaintiff fully released and discharged the law firm, its insurer, its officers, directors and employees from all liability, claims, and causes of action, including tort actions. The language of the release was not limited to plaintiff's worker's disability compensation claim; it included claims stemming from defendant's capacity as the property owner. "[T]he scope of a transaction which embraces redemption agreements for workers' compensation actions and settlement of potential claims against tortfeasors is not limited to the settlement of claims for injuries arising out of and in the course of employment." *Beardslee v Michigan Claim Services, Inc*, 103 Mich App 480, 488; 302 NW2d 896 (1981)(citations omitted).[1]

Summary disposition as to defendant Davey was appropriate because plaintiff failed to produce evidence that would have supported a finding that defendant Davey knew or should have known of the ice-covered pavement. Here, plaintiff was an invitee. A person is an invitee if he was "induced to come by personal invitation, or by employment which brings him there, or by resorting there as to a place of business, or of general resort held out as open to customers." *Polston v S. S. Kresge Co*, 324 Mich 575, 578; 37 NW2d 638 (1949). Plaintiff was on the property because he was employed there. In *Kroll v Katz*, 374 Mich 364; 132 NW2d 27 (1965) our Supreme Court defined the duty a possessor owes to his invitees as follows:

> The [possessor] is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. He must not only warn the visitor of dangers of which he knows, but must also inspect the premises to discover possible defects. There is no liability, however, for harm resulting from conditions from which no unreasonable risk was to be anticipated, or those which the occupier did not know and could not have discovered with reasonable care. The mere existence of a defect or danger is not enough to establish liability, or unless it is shown to be of such a character or of such duration that the jury may reasonably conclude that due care would have discovered it." *Id.* at 373.

Therefore, in order to recover, plaintiff must show that defendant knew or should have known about the existence of the unsafe condition. *Whitmore v Sears Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d

318 (1979). "Notice may be inferred from evidence that the unsafe condition has existed for a length of time sufficient to have enabled a reasonably careful storekeeper to discover it." *Id.* Further, "where the alleged hazardous condition was caused by . . . weather conditions . . ., the plaintiff was required to prove that the defendant had notice of such conditions and had reasonable time to correct the same." *Hulett v Great Atlantic & Pacific Tea Co*, 299 Mich 59, 68; 299 NW 807 (1941). Plaintiff failed to take defendant Davey's deposition before the discovery cut-off date and was unable to produce evidence that defendant Davey knew or should have known of the ice on the pavement, and that he had reasonable time to correct the condition.

Because we have found that summary disposition was proper for both parties, based on the release for defendant Kutinsky and the lack of notice for defendant Davey, we do not need to address whether the Worker's Disability Compensation Act's exclusive remedy provision applies.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell
/s/ Robert J. Danhof

[1] We cannot determine whether the release pertains to defendant Davey because the record does not indicate whether defendant Davey was an officer or employee of the law firm.